Congressional Research Service

Memorandum December 16, 2002

TO: Senate Committee on Governmental Affairs
Attention: Cynthia Lesser

FROM: Jack Maskell
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SUBJECT: Issues Concerning Post Employment, Revolving Door Laws and Former Secretary of the Treasury

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This memorandum responds to the Committee's request, as discussed with Cynthia Lesser, for a legal analysis of whether any laws or regulations were violated in the case of former Secretary of the Treasury, Robert Rubin, contacting an official of the Treasury Department in November of 2001 concerning the potential downgrading of the credit rating of Enron Corporation by a private credit-rating business.

According to information from the press, and as provided by the Committee, Mr. Rubin on November 8, 2001, then working for a private financial industry institution, Citigroup Incorporated, called the Treasury Undersecretary for Domestic Finance, Mr. Peter Fisher, to discuss the possibility, or as variously described, the option, or to sound out Mr. Fisher's thinking about the possibility of Mr. Fisher's calling the private credit ranking business Moody's, to ask them to delay action on Enron's credit rating until banks and other private institutions decided about additional capital infusion to Enron, to avert the credit downgrade of Enron, and thus to avert a potential negative effect on the nation's energy markets. According to the reports Mr. Rubin had himself expressed doubts to Mr. Fisher concerning the advisability of such a call, and Mr. Fisher had informed Mr. Rubin during that conversation that he did not intend to make such a call.

The issue of the propriety or legality of the contact made by Mr. Rubin is examined in light of federal conflict of interest restrictions on former high ranking Government officials. Aside from such post-employment conflict of interest laws applicable to former Government officials and their contacts with federal agencies, it may be noted that persons who are now private citizens, as well as the corporations that they might represent, have been recognized to possess First Amendment rights to petition the Government and to engage in advocacy

speech with the Government (even when otherwise competitors combine to lobby the Government on a matter of mutual interest to the industry).[1]

The post-employment, "revolving door" restrictions that apply to cabinet level officials, who are considered under the law to be "very senior" officials of the Government, consist of five basic limitations on post-employment, private "representational" activities:

1. *Lifetime Ban on "Switching Sides."* Cabinet officials, like all other officers and employees of the executive branch, are subject to a lifetime ban on "switching sides" on certain particular matters, that is, they are barred from ever representing a private party before or against the United States Government in relation to a "particular matter" involving "specific parties," such as a specific legal case, investigation, or contract, when the official had worked on that *same* matter involving those parties "personally and substantially" while in the employ of the Government. 18 U.S.C. § 207(a)(1). The lifetime prohibition is upon subsequent "representational" or "professional advocacy" types of activities, that is, where the former official makes "any communication or ... appearance" to or before the Government "with the intent to influence" the Government on the same matter on which the former official had personally and substantially worked for the Government while in its employ.[2]

2. *Two-Year Ban on "Switching Sides."* Cabinet officials and all other officers and employees of the executive branch are subject to the prohibition at 18 U.S.C. § 207(a)(2) which provides a two-year ban on the same types of private representational, post-employment conduct involved in the lifetime ban, except that it extends to matters which were merely under the "official responsibility" of the federal official during the last year in which the employee was with the Government. This lesser restriction does *not* require that the former federal employee have personal and substantial involvement in the matter when the individual worked for the Government.

3. *Aiding or Assisting Representations in Treaty or Trade Negotiations.* Section 207(b) of title 18 prohibits all officers and employees of the executive branch, and certain officials in the legislative branch, for one year after leaving the Government, from representing, aiding or advising anyone concerning United States trade or treaty negotiations when the former officer or employee had personally and substantially participated in ongoing negotiations on behalf of the United States within the last year of his employment, and who had access to certain non-public information.

4. *One-Year "Cooling-Off" Period on Lobbying the Executive Branch.* The restrictions of 18 U.S.C. § 207(d) apply to "very senior" officials of the executive branch, including the Vice President, officials compensated at level I of the Executive Schedule (cabinet officers and certain other high-ranking officials), and employees of the Executive Office of the President compensated at level II of the Executive Schedule. These officials may not for one year after leaving the Government make representations or advocacy contacts on *any* matter before or to their former agencies or departments, or to any person in an Executive Level position I through V in *any* department or agency of the entire executive branch.

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[1] *Eastern Railroads President Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127, 137-138 (1961). *See*, generally, discussion in Eastman, *Lobbying: A Constitutionally Protected Right*, American Enterprise Institute for Public Policy Research (1977).

[2] *See* Office of Government Ethics Regulations, at 5 C.F.R. §§ 2637.101(c)(5), 2637.201(b).

5. *Representing Foreign Governments.* Section 207(f) bars, for a year after leaving the Government, all "senior" or "very senior" employees of the executive branch (including cabinet officials), from performing certain representational or advocacy activities for or on behalf of a foreign government or foreign political party before the United States Government. This provision prohibits, for one year after leaving the Government, those covered former officials from representing an official foreign entity "before any officer or employee of any department or agency of the United States" with intent to influence such United States official in his or her official duties, and prohibits a former senior or very senior official from aiding or advising a foreign entity "with the intent to influence a decision of any officer or employee of any department or agency of the United States."

Clinton Administration Appointees. In addition to the statutory restrictions and limitations, senior appointees in the executive branch in the Clinton Administration were required under Executive Order to take an "ethics pledge," which had extended some of the time limitations of the statutory restrictions to five years, and which had added certain other limitations.[3] The officials to whom these added restrictions applied included cabinet appointees. The provision of the order of potential relevance had limited those covered officials from lobbying any officer or employee of the former officials' agencies for five years after leaving the Government. That Executive Order was, however, revoked and withdrawn in the last days of the Clinton Administration (on December 28, 2000),[4] and President Bush has never re-instituted the additional ethical limitations on his or his predecessor's appointees.

Of the applicable restrictions, there would appear to be only two provisions of the post-employment laws that might have even a potential relevance to the activities of Mr. Rubin, that is, the restrictions on "switching sides" and the so-called "cooling off" requirements. It does not appear from the information available, however, that the call from Mr. Rubin to the current Undersecretary of the Treasury on November 8, 2001, violated either of these potentially applicable post-employment, revolving door laws.

The "lifetime ban" on "switching sides" in 18 U.S.C. § 207(a), is a fairly narrow and case specific restriction requiring that one who worked on a particular governmental matter such as a specific contract, a particular investigation, or a certain legal action involving specifically identified private parties, not "switch sides" to then represent that private party before the Government on that same, specific matter. There is no indication, in the first instance, that the Treasury Department during Mr. Rubin's tenure was concerned during that time with Enron's credit rating by Moody's, and secondly, if such matter did specifically come before the Treasury Department during that time, there is no indication from the materials provided that Mr. Rubin had worked on any such matter personally and substantially while with the Treasury Department.[5] Finally, it is not apparent that such a matter, involving Treasury Department policy of discussing with an outside, private credit business the possibility of conferring or consulting with banking interests and other private

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[3] Executive Order No. 12834, January 20, 1993.

[4] Executive Order No.13184, December 28, 2000.

[5] The two-year ban on these type of matters involving specific parties which had been under the "official authority" of a Government official, would not be relevant, in any event, since Mr. Rubin departed the Treasury Department on July 2, 1999, and a call to the Treasury Department on November 8, 2001, would be beyond two years. *See* dates of service of Secretary Rubin in official Treasury Department biography, www.ustreas.gov/education/history/secretaries/rerubin.html.

investors about the possible infusion of capital to a private business, with an eye to effectuating a delay in a credit rating downgrade, was the type of particular governmental matter involving specific parties, as required by this part of the statute. The "switching sides" provision applies, in the words of the statute, to a "particular matter" such as an "investigation, application, request for a ruling or determination, rulemaking, contract, controversy, claim, charge, accusation, arrest or judicial or other proceeding ...,"[6] and then only when such "particular matter" involves specific parties. The regulations of the Office of Government Ethics note that: "Such a matter typically involves a specific proceeding affecting the legal rights of the parties or an isolatable transaction or related set of transactions between identifiable parties."[7]

As to the cooling off periods, it has been noted that although President Clinton had by Executive Order required a 5 year "cooling off" period from his high-level appointees, such an extended restriction was revoked by Executive Order in December of 2000, before the subject call of Mr. Rubin, and no such extended restriction has been re-instituted by statute or Executive Order. The other operative "cooling off" period for those who were very high-level executive branch officials, is a one year "no contact" period on an official matter before the agency. The contact made by Mr. Rubin, even if the one year cooling off period arguably covered such a matter involved (that is, that it was a matter before the agency "on which such person seeks official action"), and even if the restriction covered the nature of the communication made by Mr. Rubin (a communication "with the intent to influence"), involved a communication which was made in November of 2001, more than two years after Mr. Rubin's departure from the Department of Treasury,[8] and thus was clearly outside of the one-year statutory restriction.

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[6] 18 U.S.C. § 207(i)(3).

[7] 5 C.F.R. § 2637.201(c).

[8] *See* footnote 4, *supra.*